



Citation: *KT v Canada Employment Insurance Commission*, 2023 SST 457

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant:	K. T.
Respondent:	Canada Employment Insurance Commission
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Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (479760) dated May 4, 2022 (issued by Service Canada)
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Tribunal member:	Audrey Mitchell
Type of hearing:	In person
Hearing date:	November 14, 2022
Hearing participant:	Appellant
Decision date:	January 20, 2023
File number:	GE-22-1827

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer says that he was let go because he went against its vaccination policy: he didn't follow the testing protocol for unvaccinated employees.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy and testing protocol isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Issue

[6] Did the Claimant lose his job because of misconduct?

Analysis

[7] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.²

[8] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

² See sections 30 and 31 of the Act.

lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[9] I find that the Claimant lost his job because he went against his employer's testing protocol.

[10] The Claimant says his employer dismissed him for not complying with its COVID-19 vaccination and testing policies. He gave several reasons in support of his belief that his employer was wrong to fire him. But he also says his conduct isn't the real reason for his dismissal, but the excuse for it.

[11] The Commission says the Claimant didn't comply with his employer's COVID-19 vaccine and testing policies. It concluded that this caused him to lose his job.

[12] The Claimant's employer implemented a COVID-19 vaccination policy. It required its team members to be fully vaccinated and to attest or submit proof of vaccination to the company. The employer also had a testing protocol for unvaccinated team members. It allowed them to do routine testing as an interim measure.

[13] The employer sent the Claimant a letter terminating his employment. It said the reason for the dismissal is that the Claimant did not follow a company directive. The letter referred to COVID-19 testing.

[14] Even though he suggests that his conduct wasn't the reason for the loss of his job, the Claimant agrees that he didn't say if he was vaccinated, and he didn't complete routine testing. His employer refers to the Claimant's failure to follow company directives related to mandatory rapid testing in disciplinary letters sent to him before dismissing him. This is the reason given in the final letter for dismissing the Claimant.

[15] I am not persuaded by the Claimant's statement that his conduct isn't the reason he lost his job. I give more weight to his statements in his application for benefits, which the employer's letters support. Even though he doesn't think his employer had to

dismiss him, I find that the Claimant lost his job because he went against his employer's COVID-19 testing protocol.

Is the reason for the Claimant's dismissal misconduct under the law?

[16] The reason for the Claimant's dismissal is misconduct under the law.

[17] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct – the questions and criteria to consider when examining the issue of misconduct.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁵

[19] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.⁶

[20] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[21] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This

³ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁹

[22] I can decide issues under the Act only. I can't make any decisions about whether the Claimant has other options under other laws. And it is not for me to decide whether his employer wrongfully let him go or should have made reasonable arrangements (accommodations) for him.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[23] In a Federal Court of Appeal (FCA) case called *McNamara*, the claimant argued that he should get EI benefits because his employer wrongfully let him go.¹¹ He lost his job because of his employer's drug testing policy. He argued that he should not have been let go, since the drug test wasn't justified in the circumstances. He said that there were no reasonable grounds to believe he was unable to work safely because he was using drugs. Also, the results of his last drug test should still have been valid.

[24] In response, the FCA noted that it has always said that, in misconduct cases, the issue is whether the employee's act or omission is misconduct under the Act, not whether they were wrongfully let go.¹²

[25] The FCA also said that, when interpreting and applying the Act, the focus is clearly on the employee's behaviour, not the employer's. It pointed out that employees who have been wrongfully let go have other solutions available to them. Those solutions penalize the employer's behaviour, rather than having taxpayers pay for the employer's actions through EI benefits.¹³

[26] In a more recent case called *Paradis*, the claimant was let go after failing a drug test.¹⁴ He argued that he was wrongfully let go, since the test results showed that he wasn't impaired at work. He said that the employer should have accommodated him

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.

¹³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 23.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

based on its own policies and provincial human rights legislation. The Court relied on *McNamara* and said that the employer's behaviour wasn't relevant when deciding misconduct under the Act.¹⁵

[27] Similarly, in *Mishibinijima*, the claimant lost his job because of his alcohol addiction.¹⁶ He argued that his employer had to accommodate him because alcohol addiction is considered a disability. The FCA again said that the focus is on what the employee did or failed to do; it is not relevant that the employer didn't accommodate them.¹⁷

[28] These cases aren't about COVID-19 vaccination policies. But what they say is still relevant. My role is not to look at the employer's behaviour or policies and determine whether it was right to let the Claimant go. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.

[29] The Claimant says that there was no misconduct. He says so for several reasons, including that:

- his employer and the Commission didn't consider the nature, context, and circumstances of his role with the employer,
- his employer unilaterally and arbitrarily changed the terms and conditions of his employment, and,
- he couldn't foresee that his conduct was likely to cause him to lose his job.

[30] The Commission says that there was misconduct because the Claimant didn't comply with his employer's COVID-19 vaccination policy and testing protocol. It says he knew about the policies. He understood that failure to comply could cause him to lose his job. So, it concluded that the Claimant's conduct constitutes misconduct under the Act.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraph 31.

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[31] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could lose his job if he didn't comply with his employer's COVID-19 testing protocol for unvaccinated employees.

[32] The employer's COVID-19 vaccination policy says:

- employees have to be fully vaccinated by October 31, 2021,
- employees who don't say they are fully vaccinated will be subject to disciplinary, administrative or other corrective measures, up to and including termination of employment, and,
- the employer's accommodation process is available for exemptions from the requirement to take the COVID-19 vaccination for valid human rights reasons.

[33] The employer also had a protocol for employees who are unvaccinated. It was an interim measure for these employees and a policy for those who granted a human rights accommodation. It says:

- employees have to work from home unless their presence in the workplace is critical to business operations,
- employees in business-critical roles who have to go to the workplace have to complete rapid-testing twice a week,
- employees other than those who are granted a human rights accommodation must complete a vaccination education course, and,
- going against this protocol may result in disciplinary measures, up to and including termination of employment.

[34] The Claimant said in his application for benefits that he declined to attest to his vaccine status. He said that his employer offered an alternative rapid testing option after the deadline for full vaccination had passed. He explained that to complete the

testing, you had to attest to agree to comply with the testing protocol and the vaccination policy. So, he didn't comply with the testing alternative policy.

[35] The Claimant's employer sent copies of disciplinary letters it sent to the Claimant. The first from November 8, 2021, notified the Claimant of a one-day suspension for failing to complete rapid testing. The second from November 16, 2021, notified him of a three-day suspension for the same reason.

[36] The employer sent the Claimant a third letter on November 22, 2021. It notified the Claimant of a five-day suspension. The employer suspended the Claimant because he had failed to complete rapid testing. This third letter stated that the Claimant was expected to upload rapid test results in the employer's portal no later than midnight that night. It said that failure to do so would result in termination of his employment.

[37] On December 2, 2021, the employer sent the Claimant a letter terminating his employment for not following the company directive concerning rapid testing.

[38] I find that the Commission has proven that there was misconduct. I do so because the Claimant knew or should have known that he would likely lose his job if he didn't comply with his employer's COVID-19 testing protocol. But he chose not to do so, even after his employer suspended him three times.

[39] The Claimant argues that his employer's vaccination policy was unreasonably applied in the context of his job and his role in the workplace. He says he was at low risk of contracting and transmitting the COVID-19 virus.

[40] The Claimant said he worked alone most of the time, and that meetings and training mostly took place over the phone or internet. He testified that when he was dismissed, there were seven people working out of the central office. He said that only he and one other colleague were working on the main floor, and that after his colleague was transferred, he had the whole floor to himself.

[41] I note that the employer's policy states that it was requiring the vaccine as part of its plan to return to more normal operations. And the testing requirement for

unvaccinated employees without an accommodation was an interim measure to its ultimate requirement that its employees take the COVID-19 vaccine. This seems reasonable to me in the context of the Claimant's job in the workplace where he had limited contact with others. But, whether it was reasonable for the Claimant's employer to implement a COVID-19 vaccination policy and testing protocol for the unvaccinated is not for me to decide.

[42] I don't agree with the Claimant that going against the testing requirement didn't interfere with him carrying out his duties with the employer. His employer wanted to prevent the spread and reduce the impact of COVID-19 through its vaccination policy. In an email, the employer said it was implementing the testing protocol on an interim basis for everyone's health and safety. So, I find that refusing to complete the testing as his employer required, meant that the Claimant could not fulfill his duties in the way his employer wanted him to, namely in a way that it deemed safe for everyone. And I don't find the Claimant's limited contact with coworkers changes this.

[43] In support of his argument, the Claimant points to a Commission policy document that is publicly available. It says the Commission may contact an employer to determine if the application of the employer's policy to an employee who was dismissed or suspended was reasonable within the workplace context.

[44] I note that the Commission's policy gives an officer discretion to contact the employer about an employer's policy. But I don't find that the Commission deciding not to do so prevents me from deciding whether the Claimant lost his job due to misconduct.

[45] The Claimant also says the employer had measures in place to deal with the pandemic. He said those measures were working, and the employer had other reasonable options it could have put in place.

[46] I understand that the Claimant disagrees with his employer's decision to implement vaccination and testing policies. And I don't doubt that the measures the employer had in place helped it operate through the first part of the pandemic. But as

noted above, it's not my role to decide if the Claimant's employer should have made alternate arrangements to its vaccination policy and testing protocol.

[47] The Claimant says his employer unilaterally and arbitrarily changed the terms and conditions of his employment. He says these are set out in his collective agreement and letters of understanding.

[48] The Claimant sent the Tribunal a copy of his collective agreement and attached letters of understanding. The collective agreement states that the company will consult with the union when there are changes to job classifications or when jobs are to be altered. It also states that the company "has the sole authority ... to make and alter from time to time rules and regulations to be observed by employees". It does not address the issue of vaccines.

[49] I don't find that by implementing COVID-19 vaccine policy and testing protocol for the unvaccinated, the employer unilaterally and arbitrarily changed the terms and conditions of his employment. Rather, I find that the employer exercised its authority to implement policies to deal with the COVID-19 pandemic that its employees had to follow. I find that this is consistent with what the company and union agreed to in the collective agreement.

[50] The Claimant sent the Tribunal an unpublished copy of a decision of the General Division of the Social Security Tribunal.¹⁸ He says the circumstances in that case are similar to his and that the Tribunal Member's reasoning should apply to his case.

[51] I am not bound by decisions made by other General Division Tribunal Members. I can adopt the reasoning of such decisions if I find them persuasive. But I don't in this case.

[52] In the case noted above, the claimant worked in an administrative role in a hospital. She decided not to take the COVID-19 vaccine because she has a health condition. Her employer suspended and later dismissed her. The claimant's collective

¹⁸ See *A.L. v Canada Employment Insurance Commission*, GE-22-1889.

agreement has an article about the influenza vaccine. It states that employees have the right to refuse any recommended or required vaccine.

[53] The Tribunal Member in the above-noted case found that the Commission had presented no evidence that there was an expressed requirement arising out of the claimant's employment agreement that she take the COVID-19 vaccine. The Member also decided that no evidence had been presented that would suggest that the Claimant had an implied duty arising from her employment agreement to be vaccinated.

[54] I find the Claimant's case is different from that in the case he submitted. As I have already found, the Claimant's collective agreement does not have an article about vaccination. And it recognizes the employer's authority to make rules and regulations for employees to follow. The Claimant's employer created and implemented a COVID-19 vaccination policy and testing protocol that it required its employees to follow.

[55] Despite the difference in the two cases, it is not my role to decide whether the Claimant's employer breached his collective agreement by unilaterally and arbitrarily changing the terms and conditions of his employment. Nor is it my role to determine whether the employer's policy is invalid or unlawful because it isn't legislated or enforced by law or provincial or federal health order. As noted above, in *McNamara, Paradis* and *Mishibinijima*¹⁹ these Court cases make it clear that the focus must be on what a claimant has or has not done.

[56] I note that the Claimant has filed a grievance against his suspensions and dismissal. This is an appropriate recourse mechanism for the Claimant if he feels his employer violated his collective agreement. So, even though I find that the Claimant's case is different than the one referred to above decided by another General Division Tribunal Member, I won't decide if his employer breached his collective agreement because that's outside of my authority.

[57] The Claimant says his employer was arbitrary and inconsistent in enforcing its policy when it let him continue to fulfill his duties. He says the employer breached its

¹⁹ See paragraphs 23 to 27 of this decision above.

own policy and violated public health guidelines when it said he could continue to report to work after the October 31, 2021 COVID-19 vaccination deadline but before rapid tests were available.

[58] The Claimant argues that his employer knew that he was unvaccinated and not testing. But the employer allowed him to work onsite in early November, despite what the vaccination policy said. He says his not testing didn't interfere with him carrying out his duties and his not testing was not of much concern to his employer.

[59] The Claimant sent emails to the Tribunal that his employer sent about its testing protocol and delivery of rapid tests. The last was sent on November 8, 2021. It says that a kit with Health Canada approved rapid tests has been sent to their homes. It adds that employees should report to work as usual and complete daily mandatory screening and start testing as soon as they receive their kits.

[60] I don't agree with the Claimant that his employer allowing him in the workplace until he received the rapid tests means that it contradicted its policy and that he could have continued his working relationship with the employer without having to do rapid tests. The employer's delivery of the rapid tests was delayed. It asked the Claimant to do daily screening before reporting to work and start testing as soon as he got the tests. I don't find this confusing.

[61] The testing protocol says "should self-administered rapid testing not be available as an option, other rapid-testing methodologies and/or additional prevention measures may be required, as applicable, and may change from time to time". I find that this is consistent with the employer's instructions to the Claimant up to November 8, 2021, when he had not yet received his supply of rapid tests.

[62] Ultimately, starting November 9, 2021, the Claimant declined to complete rapid tests as required by the employer's testing protocol. The Claimant emailed his employer on November 14, 2021. He said he won't comply with its testing/vaccination policies because they are in breach of his collective agreement. I find that the Claimant knew what his employer's policies asked him to do but decided to go against them.

[63] The Claimant argues that the Commission's statement that I have to focus on his conduct, not the employer's is problematic. He cites a Federal Court decision to support his argument that his employer's conduct is relevant.²⁰ In that decision, the Court said the General Division should consider an employer's conduct where it may have led to misconduct.

[64] The Claimant's concern is how the employer's testing protocol says employees are to report test results. It states that when registering on the employer's platform, employees will be asked to attest to reviewing, understanding, and agreeing to comply with its rapid-testing protocol and policies. It continues that this includes the employer's vaccination policy. The Claimant says this is what led him not to do the testing, because he did not want to get vaccinated as required by the vaccination policy.

[65] The employer told the Commission that it had implemented the rapid testing protocol as a short-term measure. It said its intent was to give employees time to become fully vaccinated. The employer sent the Commission a copy of rapid testing questions and answers. One question is whether rapid testing would continue through January. The answer was that it would, but it would be discontinued after January 31, 2022.

[66] The employer sent the Commission an email dated December 2, 2021. It states that effective February 1, 2022, employees who are not fully vaccinated against COVID-19 will be placed on unpaid leave, leading to eventual termination. I acknowledge that December 2, 2021 was the day the Claimant's employer dismissed him.

[67] The Claimant referred to rapid testing as an alternative to vaccination against COVID-19. But the testing protocol doesn't refer to it in that way. Again, it refers to the testing as an interim measure. And the stated objective is that all employees must be fully vaccinated.

[68] I find that the employer's COVID-19 vaccination policy, its testing protocol and its testing questions and answers are consistent about employees having to be vaccinated.

²⁰ See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

So, I give a lot of weight to the employer's statement to the Commission that the testing protocol was an interim measure intended to give time to employees to get vaccinated. Because of this, I don't find that requiring the Claimant to attest that he would comply with the vaccination policy was duplicitous or that the Claimant's conduct was a direct result of his employer's actions in the way it was in *Astolffi*. I find that the Claimant chose not to get vaccinated and not to follow the employer's testing protocol for his own reasons.

[69] The Claimant says he couldn't foresee that his conduct would likely result in his dismissal. He lists several reasons for saying this. Having reviewed the employer's vaccination policy, testing protocol and its letters of discipline to the Claimant, I don't agree.

[70] The employer's COVID-19 vaccine policy and testing protocol both say that not complying may result in disciplinary action. The first two disciplinary letters the employer sent the Claimant say that failure to complete the mandatory testing will result in disciplinary measures up to and including termination of employment. A third letter says failure to test will result in the termination of the Claimant's employment. The employer notified the Claimant that he was dismissed in a final letter

[71] I understand that the Claimant doesn't agree with his employer's COVID-19-related policies. I also understand that he thought the employer would just put him on unpaid leave. I have no reason to doubt the Claimant's statement that he was a long-serving and better than average employee. But I find that he should have foreseen that not completing the rapid tests would lead to his dismissal. This is exactly what his employer said would happen in its November 22, 2021 letter to him.

[72] I find that the Claimant's action, namely not complying with his employer's COVID-19 testing protocol was wilful. He made a conscious, deliberate, and intentional choice not to complete the tests. He did so knowing that he would likely lose his job. For these reasons, I find that the Commission has proven that there was misconduct.

So, did the Claimant lose his job because of misconduct?

[73] Based on my findings above, I find that the Claimant lost his job because of misconduct.

[74] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew or should have known that refusing to complete routine testing was likely to cause him to lose his job.

Conclusion

[75] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[76] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section